No. 4127

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ONE KISSEL TOURING AUTOMOBILE and SAN FRANCISCO SECURITIES CORPORATION,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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Statement of the Case.

This is a writ of error to the United States District Court of the District of Arizona sued out by the Government to reverse an order of that court dismissing the libel of the Government against One Kissel Touring Automobile upon the objection of the claimant, San Francisco Securities Corporation, the owner of the automobile. The opinion of District Judge Dooling dismissing the libel is reported in 289 Fed. 120.

The libel or information charges in substance that the automobile was seized by the Government Nar-

cotic Inspector on or about October 22, 1922, and that at the same time said inspector arrested the driver, P. P. Means, alias Mazzy, and seized a package containing approximately one grain of cocaine which was found upon the person of the driver; that the package did not bear the revenue stamps required and that the tax thereon had never been paid to the United States; that at said time said driver was transporting said narcotics in said automobile and had removed them from an unknown point in the District of Arizona to a point in the City of Tuscon in said district for the purpose of selling the same; that said removal was with the intent to defraud the United States of the taxes thereon; that the driver was using the automobile as a means of removal; and that the automobile was held by the inspector as forfeited to the United States under Section 3450 of the Revised Statutes of the United States.

The San Francisco Securities Corporation, defendant in error here, appeared in the condemnation proceedings and by its answer alleged that it was the owner of and entitled to the possession of the automobile pursuant to a conditional sale contract under which Means was in possession of it; disclaimed any knowledge of or consent to the use of it as alleged in the libel; alleged that such use does not constitute a violation of Section 3450, Revised Statutes and asked that the libel be dismissed and the automobile delivered to it.

The agreed statement of facts (Transcript, page 17) filed in the proceedings establishes the claim of the San Francisco Securities Corporation to the automobile, its disclaimed knowledge of any unlawful use, and that in attempting to deliver the capsule of cocaine Means carried it "upon his person, he being at the time within the said Kissel automobile".

Upon these facts the trial court decided that there was no violation of Section 3450, Revised Statutes, and dismissed the libel. We submit that the decision of the District Court is in accord with the requirements of justice and sound principles of statutory construction and should therefore be affirmed.

Argument.

THE AGREED FACTS DO NOT SUSTAIN THE ALLEGATIONS IN THE LIBEL OF REMOVAL, DEPOSIT AND CONCEALMENT OF NARCOTICS WITH INTENT TO DEFRAUD THE UNITED STATES OF TAXES DUE THEREON.

It is evident that the agreed statement of facts does not sustain the allegations of the libel. It is alleged in the libel that at the time of the arrest and seizure the driver, Means, "was then and there using said automobile as a means of removal and a place in which to deposit and conceal the non-taxed said narcotics", whereas the agreed facts are that the cocaine was carried "upon his (Means') person, he being at the time within said Kissel automobile".

The statute pursuant to which the libel or information was filed is Section 3450, Revised Statutes of the United States, the pertinent portions of which are as follows:

> "And be it further enacted, That in case of any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities shall be REMOVED, or shall be deposited or concealed IN ANY PLACE, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case, and IN EVERY CASE WHERE ANY GOODS OR COMMODITIES SHALL BE FORFEITED, under this act or any other act of Congress relating to the internal revenue, ALL AND SINGULAR THE CASKS, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively AND EVERY VESSEL, BOAT, CART, CARRIAGE, OR OTHER CONVEYANCE WHATSOEVER, and all HORSES or other animals, AND ALL THINGS USED IN THE REMOVAL OR FOR THE DEPOSIT OR CONCEALMENT THEREOF, respectively, shall be forfeited; and every person who shall REMOVE, deposit or conceal, or be concerned in REMOVING, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not exceeding five hundred dollars." (Capitals ours.)

The libel or information charges three things against the automobile, to-wit: that it was used

(1) as a means for the *removal* of the narcotics, and as a place for the (2) *deposit,* and (3) *concealment* thereof, all

> "with the intent * * * to defraud the United States of the taxes which were then and there imposed by law on said narcotics".

The precise question as to whether the facts here established sustain the charge of *removal* with intent to defraud the United States of the tax imposed, has been considered by the United States District Court for the Western District of Washington, Northern Division, in two cases decided together; *United States v. One Ford Truck,* and *United States v. One Paige Touring Car,* 286 Fed. 204; in which that court construed the statute here involved in accord with our views. After an exhaustive consideration of the term "removal" as used in Section 3450, R. S., the court concluded:

> "The foregoing statutes show that the word 'removed', as used in Section 14, has reference to removal from particular, specified places designated by law. These statutes clearly show the character of places meant, and the fact that they were not again enumerated in Section 14 of the Act of July 13, 1866, probably arises out of the fact that it was a general section meant to cover illegal removals from all places mentioned in the several sections of the Act."

And in the case at bar the District Court, in adopting the foregoing view, said:

> "The effect of this statute in a case identical with the present one was considered by Judge Cushman in the cases of U. S. v. One Ford

> Truck and U. S. v. One Touring Car, (D. C.) 286 Fed. 204. He held that the words 'removal' and 'removed', as used in section 3450, are not synonymous with 'transportation' or 'transported', but have reference to the removal from some definite place, where the tax imposed is due and where it should be paid, before the taxed articles are taken therefrom. With this construction of the statute I entirely agree, and there is nothing in the facts of this case to show such removal."

The facts here are identical with those considered by the court in the Washington cases referred to above, and in passing upon the question of *deposit* and *concealment,* that court said:

> "The narcotics described in these informations were not in any sense 'concealed' in the automobile, but they were 'concealed' upon the person of the driver as would be a 'concealed' weapon. The automobile was not the place of 'deposit' of the narcotics in either case, but the narcotics were placed or 'deposited' in the pocket of the driver and he then got into the automobile. No fair construction of the word 'deposit' would describe such an act."

Although the trial judge in this case did not entirely agree with the reasoning of Judge Cushman upon that point, he nevertheless had no difficulty in also finding that there had been no violation of the statute in this respect. After quoting from the opinion in the Washington cases, Judge Dooling said:

> "I am not sure that, being 'concealed' and 'deposited' in the pocket of the driver, he be-

ing in the automobile, the narcotics may not well be said to be concealed and deposited in the automobile as well. But it requires more to warrant the forfeiture of the automobile than the deposit or concealment of the drugs therein. They must be so deposited or concealed with intent to defraud the United States of the tax imposed on them, and the burden is upon the government to show that such was the intent. Means, the driver of the car, was so far as appears, neither importer, manufacturer, producer, or compounder of the drugs, nor connected in any way with any of them. The tax was not due from him, nor would he have been permitted to pay it. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my my judgment, to the fact that he knew that he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent. It should be a clear case which would warrant the forfeiture of an automobile valued at $1400, and belonging to one not connected with the transaction, for the failure on the part of some one unknown to pay to the government a one cent tax."

This, we submit, is the just and sound construction of the statute. It is elementary and fundamental that such a statute should be given a construction "consistent with justice and the dictates of natural reason".

Counsel for the Government complains of the "strictness" of Judge Dooling's construction of

the statute, but it is a principle of statutory construction that confiscatory laws must and should be "strictly" construed. In 25 *Corpus Juris* 1172, the rule is stated as follows:

> "A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for forfeitures as will be consistent with justice and the dictates of natural reason, although contrary to the strict letter of the law."

And this rule has its foundation in the Fourth Amendment to the Federal Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated * * *."

II.

THE OBJECTIONS RAISED BY GOVERNMENT'S COUNSEL TO THE DECISION OF THE TRIAL COURT ARE NOT WELL TAKEN.

The cases cited by counsel for the Government which give a "more extended" meaning to the term *removal,* are not in point for the reason that the term is construed in those cases as used in the Bankruptcy Act and other than forfeiture statutes, the principles of construction applicable being very dif-

ferent. The case of *U. S. v. One Essex,* 266 Fed. 138, and the other cases cited to the effect that automobiles seized while transporting liquor upon which the tax has not been paid may be proceeded against either under the Prohibition Act or Section 3450, R. S., are also not in point because the precise question of whether, under the facts of this case, there has been a removal or deposit or concealment with intent to defraud the Government of a tax was not considered by the court in any of them. Furthermore, the weight of authority upon the question decided in those cases is contrary to the view expressed in the cases cited. See

Lewis v. U. S., 280 Fed. 5 (6th Circuit);
U. S. v. One Haynes, 274 Fed. 926 (5th Circuit);
U. S. v. One Packard, 284 Fed. 394;
McDowell v. U. S., 286 Fed. 521 (9th Circuit);
U. S. v. Yuginovich, 256 U. S. 450.

Counsel argues in effect that we *may not infer* from the agreed facts any *intent* on the part of the driver *to pay* the tax due and therefore we *may infer* an *intent to defraud* the Government of the tax. This argument, of course, is fallacious. Could it possibly be inferred from the fact that Means had a one grain capsule of cocaine *in his pocket,* he being in the automobile, that he had used the automobile (valued at $1400.00) for the purpose of deposit and concealment with the intent to defraud the Govern-

ment of a tax of one cent due it upon the capsule of cocaine? Clearly not. As Judge Dooling says in his opinion:

> "Means, the driver of the car, was so far as ducer, or compounder of the drugs, nor conappears, neither importer, manufacturer, pronected in any way with any of them. The tax was not due from him, nor would he have been permitted to pay it. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my judgment, to the fact that he knew that he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent."

The burden of proving the removal or deposit or concealment in the automobile *with intent to defraud the Government* of the tax due is upon the Government. This burden it has failed to sustain by any proof and the only inference to be drawn from the agreed facts is that there was *no* intent on the part of the driver of the automobile to defraud the Government of any tax but a desire to protect himself in the illegitimate business of *selling* narcotics. For that offense the *wrongdoer* is subject to punishment as provided by the law prohibiting it but the *automobile* cannot be guilty of that offense and is not subject to seizure because of it. The *automobile* can be forfeited under Section 3450, R. S., only if it is *itself* the offender—only if it is

the means of *removal*, as this term is used in the statute, or is used to *deposit* or *conceal* the contraband goods. The libel charges the *automobile* in this case with these offenses, but the facts clearly do not sustain the charges.

III.

THE AUTOMOBILE IS NOT SUBJECT TO FORFEITURE UNDER SECTION 3450 REVISED STATUTES WHICH IS RENDERED INEFFECTIVE IN NARCOTIC CASES BY THE PROVISIONS OF THE HARRISON NARCOTIC ACT AS AMENDED.

Even though it were established by the agreed facts that the *automobile* was guilty of the charges of *removal* or *deposit* or *concealment,* it still would not be subject to forfeiture under Section 3450, R. S., because that statute has been rendered ineffective in narcotic cases by the provisions of the Harrison Narcotic Act (38 Stat. 785-790), as amended (40 Stat. 1113).

The Harrison Narcotic Act provides a complete scheme for the regulation of the narcotics mentioned therein. It provides its own penalties and forfeitures. Therefore, general provisions in other statutes such as Section 3450, R. S., do not apply, for if an act purports to and does provide all the penalties for violation of its provisions there is no application of the general revenue statutes. *Expressio unius est exclusio alterius.* Inasmuch as the Narcotic Act is special and declares a more limited forfeiture it must be intended to restrict all for-

feitures to the scope so defined. Sections 1 and 9 of the Narcotic Act make provision for fines, imprisonment and certain forfeitures. Section 7 provides that the collection laws generally are applicable but does not mention *forfeiture* laws. The penalty of Section 9 of the Narcotic Act is a two thousand dollar fine or not more than five years' imprisonment, which penalty is different from those provided in Section 3450, R. S., thereby showing that the Narcotic Act is inconsistent with Section 3450 and within the field covered by the Narcotic Act the provisions of Section 3450, R. S., are therefore repealed.

It has been repeatedly held that general statutes are, to the extent that a subsequent statute conflicts with them impliedly repealed by such later statute. In construing the Oleomargarine Act it was held by the District Court of Illinois in

United States v. One Bay Horse, 128 Fed. 207,

that R. S. 3450 and R. S. 3453 did not apply and the following language was used:

> "The government seeks to apply Sections 3450 and 3453 of the Revised Statutes, passed prior to the Oleomargarine Act * * *. Such would be the case had not Congress provided a special penalty in section 17, which limits the forfeiture to the 'factory and manufacturing apparatus used by the manufacturer and all oleomargarine and raw material for its production, found in the premises'. It must be assumed that by the omission of the more drastic measures of the prior act Congress intended to distinguish between the violations of

> law in regard to which the penalties are imposed, respectively (citing cases). A statute imposing a penalty for an offense is *pro tanto* repealed by a subsequent statute fixing a lighter penalty (citing cases)."

Another similar instructive opinion construing the Food Conservation Act of August 10, 1917, is contained in

U. S. v. One Ford Automobile, 259 Fed. 894,

in which case the forfeiture of the automobile under a prior general statute was denied.

While some courts have held that automobiles seized while illegally transporting intoxicating liquor could be forfeited under R. S. 3450, the great weight of authority is to the effect that the National Prohibition Act provides a complete scheme of regulations, fines, penalties and forfeitures in dealing with intoxicating liquors and that therefore R. S. 3450 with its more drastic forfeiture provisions is impliedly repealed to an extent by the provisions of the Prohibition Act and that there cannot be a forfeiture under R. S. 3450 of the vehicle used in transporting or concealing intoxicating liquor manufactured or intended for beverage purposes with intent to defraud the revenue laws. Upon this point this court in the case of

McDowell v. U. S., 286 Fed. 521,

speaking through Mr. Justice Hunt, says:

> "Our conclusion is that in so far as it is provided by Section 3450 for the forfeiture of automobiles used to transport liquor upon which the tax has not been paid, the section has been

repealed by the provisions of the National Prohibition Act"

and cites a number of cases in accord with its view. To the same effect see

U. S. v. One Haynes Automobile, 274 Fed. 926;

Lewis v. U. S., 280 Fed. 5;

U. S. v. Yuginovich, 256 U. S. 450;

Farley v. U. S., 269 Fed. 724;

U. S. v. One Hudson Auto, 274 Fed. 473;

U. S. v. One Packard Automobile, 284 Fed. 394;

U. S. v. Footman, 268 Fed. 873;

Ketchum v. U. S., 270 Fed. 416.

We submit, therefore, that the order of the District Court dismissing the libel should be affirmed not only for the reasons set forth in the opinion of the District Court but also for the foregoing additional reasons.

Dated, San Francisco,
February 6, 1924.

Respectfully submitted,
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